# Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age

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## I. INTRODUCTION

Eric Trosch's MySpace profile was, like many other profiles on social networking sites, laden with sexual and drug references. He referred to himself as a "big steroid freak" and "big whore" who liked to smoke a "big blunt" and was "too drunk to remember" the date of his birthday.[1]

But there were some aspects of the profile that made it quite different from others. First, Trosch was the principal of Hickory High School in Pennsylvania.[2] And second, Trosch did not make the profile.[3] Justin Layshock, a Hickory High student, created the site from his grandmother's house during non-school hours.[4] By the time Trosch had discovered the site and identified its creator, word of the profile had spread around school.[5] Justin was suspended from school for ten days for disrupting the school environment.[6]

Justin's parents, on behalf of their son, filed suit in federal district court, claiming the suspension violated Justin's freedom of speech.[7] They argued that the school could not discipline their son for the speech because it was not created on school property and because, they said, it did not create a substantial disruption at school.[8]

The district court agreed, finding that although a school could in some cases censor off-campus speech, the school district in this case did not

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[1] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252 (3d Cir. 2010).

[2] *Id.* at 252.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 253.

[6] *Id.* at 254.

[7] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 594 (W.D. Pa. 2007).

[8] *Id.* at 597–98.

establish a sufficient nexus between the speech and the school.[9] In February 2010, a three-judge panel of the Third Circuit affirmed the district court's decision, explaining that it would refuse to allow the "School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."[10]

But other courts, faced with similar scenarios, have found in favor of schools. The same day that *Layshock* was decided, a different Third Circuit panel upheld a school district's decision to suspend a student for creating a fake MySpace profile of her principal.[11] The two seemingly inconsistent rulings mirror the confusion found in courts across the country and underscore the need for clarification from the Supreme Court.[12]

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[9] *Id.* at 600. On appeal, the school district argued in the alternative that Justin's speech was defamatory, while the Layshocks maintained that it was a parody and thus not defamatory. *Layshock*, 593 F.3d at 249, 263 n.20. The Third Circuit panel did not address whether the profile was a parody. *Id.* Generally, school officials face difficulties winning defamation cases against students. Many states consider school officials to be public officials and thus hold them to the higher defamation standard of actual malice established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). For an article arguing that teachers should be considered private figures, see Brian Markovitz, *Public School Teachers as Plaintiffs in Defamation Suits: Do They Deserve Actual Malice?*, 88 GEO. L.J. 1953, 1954 (2000).

[10] *Layshock*, 593 F.3d at 260. On appeal, the school district did not did not challenge the district court's finding that a sufficient nexus existed between the school and the disruption, but instead made two alternative arguments: first, that a sufficient nexus existed because Justin's speech began on campus given that he had used a photo of Principal Trosch taken from the school website, and second, that it was reasonably foreseeable that the profile would come to the attention of the school. *Id.* at 258–59. The Third Circuit rejected both arguments. *Id.* For more discussion of *Layshock*, see *infra* Part III.A.2.

[11] J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010); *see* discussion *infra* Part III.A.2.

[12] *See* Shannon P. Duffy, *Do 3rd Circuit Rulings over Student Speech on MySpace Pages Seem to Contradict?*, LEGAL INTELLIGENCER, Feb. 5, 2010, http://www.law.com/jsp/article.jsp?id=1202442025383 (noting that "[l]awyers were scratching their heads . . . over a federal appellate court's seemingly conflicting rulings in a pair of closely watched student speech cases."); *see also* David D. Johnson, Layshock *and* J.S.*: The 3rd Circuit Attempts to Define the Circumstances Under Which a School Can Punish a Student for Creating a Defamatory MySpace Profile*, DIGITAL MEDIA LAW. BLOG, Feb. 9, 2010, http://www.digitalmedialawyerblog.com/2010/02/layshock_and_js_the_3rd_circui_1.html ("In twin February 4, 2010 decisions, the Third Circuit reached opposite rulings on whether a school violated a student's First Amendment rights . . . ."); Katie Maloney, *Third Circuit Hands Down Conflicting Student Speech Rulings*, SPLC, Feb. 4, 2010, http://www.splc.org/newsflash_archives.asp?id=2024&year=2010 (the "Third Circuit handed down conflicting opinions today regarding student on-line speech: One protected a student's

Although the Supreme Court has issued opinions on student freedom of speech, it has not yet addressed the particular issue of Internet speech created outside of school, which is causing confusion among the lower courts. Cases involving discipline for speech originating outside of school are, according to one assessment, already the "most frequently litigated challenges to school officials' imposition of suspensions or expulsions for out-of-school student offenses" and will only proliferate.[13] Lacking guidance from the Supreme Court, lower courts have employed a variety of analytical approaches to address off-campus student speech cases. Some have found that such speech is beyond the disciplinary reach of the school, while others will consider student speech subject to discipline if a sufficient nexus exists between the speech and the school. Courts that apply a nexus test will, upon finding such a nexus, then analyze the speech under one or more of the tests set forth by the Supreme Court.

Most frequently, courts apply the landmark case of *Tinker v. Des Moines Independent Community School District*, in which the Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[14] For cases involving Internet speech originating outside of school, courts often first try to establish that the speech crossed over the schoolhouse gate and into school. *Tinker* focuses on the effect of the speech, allowing schools to discipline students for speech that causes, or has the potential to cause, a substantial disruption or an interference with the rights of others.[15] Under a *Tinker* analysis, the scales still tend to tip in favor of the students. As one scholar notes, unless the students are doing something "like orchestrating a mass viewing of their Web sites from school computers or advocating violence against a student, teacher, or school property, school districts can do little to stop students from posting information or sending electronic mail or instant messages on their own time using their own computers."[16]

A bright-line test that deems any speech created off campus beyond the disciplinary arm of the school, however, ignores the essence of *Tinker*'s holding: Schools have a right to proscribe speech that creates or could create

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right to speak freely off campus, the other permitted a school to punish students for doing so.").

[13] Kathleen Conn, *The Long and the Short of the Public School's Disciplinary Arm: Will* Morse v. Frederick *Make a Difference?*, 227 EDUC. L. REP. 1, 3 (2009).

[14] 393 U.S. 503, 506 (1969).

[15] *Id.* at 514.

[16] Rosann DiPietro, *Constitutional Limitations on a Public School's Authority to Punish Student Internet Speech*, 11 No. 12 J. INTERNET L. 3, 10 (2008). *But see* Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1300 (2008) (arguing that courts "allow speech restrictions under *Tinker* with relatively minimal showings of interference").

a substantial disruption. The potential disruptive effect of student speech posted on a website, for example, does not depend upon where the student was at the moment he or she first created the speech. [17]

While *Tinker* focused on the effect of the speech, two subsequent Supreme Court decisions dealt more with content. In *Bethel v. Fraser*, the Court upheld the suspension of a student for making a lewd, vulgar speech at a school assembly,[18] and in *Morse v. Frederick*, a banner reading "Bong Hits 4 Jesus" was found to be pro-drug and thus, the student who held it was subjected to discipline.[19]

Perhaps more significantly, *Morse*—the most recent Supreme Court decision on student speech—allowed the school to discipline the student for speech made beyond the school's physical campus.[20] The banner was not held on school property, but the Court deemed the speech "school speech" because it took place at a school event.[21] Thus, although the Court avoided the issue of whether schools can proscribe speech that originated off school property by deeming the banner "school speech," the *Morse* decision helps expand a school's authority to discipline students for off-campus speech.

While *Morse* may help schools expand the reach of their disciplinary arm, courts struggle with the question of which Supreme Court student speech cases apply. Some have determined that *Tinker* is not the only standard that can be used to discipline off-campus speech, and they allow schools to discipline for speech that is lewd, vulgar, or pro-drug.[22]

Meanwhile, some schools are increasingly using creative approaches in an attempt to avoid *Tinker* and the schoolhouse gate altogether. Some avoid First Amendment violations by barring students from participation in an extracurricular activity rather than by suspending or expelling them.[23] Others

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[17] According to a study by the Pew Internet & American Life Project, 93% of American teenagers use the Internet, and sixty-four percent of those users engage in some type of content-creating activity, such as maintaining a blog or a personal webpage. AMANDA LENHART ET AL., TEENS AND SOCIAL MEDIA: THE USE OF SOCIAL MEDIA GAINS A GREATER FOOTHOLD IN TEEN LIFE AS THEY EMBRACE THE CONVERSATIONAL NATURE OF INTERACTIVE ONLINE MEDIA 2 (2007), http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_Teens_Social_Media_Final.pdf.

[18] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[19] Morse v. Frederick, 551 U.S. 393, 409–10 (2007).

[20] *Id.*

[21] *Id.* at 400.

[22] *See* discussion *infra* Part III.B.

[23] *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829–38 (2002) (upholding a drug-testing policy for any student participating in extracurricular activities because students have a diminished expectation of privacy, and because the policy furthered an important interest of the school in preventing drug use among students). In cases involving speech, then, courts tend to defer more heavily to a school's decision to remove students from extracurricular activities, without requiring that a substantial disruption occurred or could

avoid the speech altogether by claiming that the students are being disciplined not for speech, but for conduct.[24]

This Note explores the ability of schools to discipline students for Internet speech created outside of school that has an effect at school. Section II provides an overview of the four Supreme Court cases addressing student free speech. Section III explores how and when the lower courts apply these decisions to situations where the speech originates off campus. As mentioned, courts sometimes categorically dismiss the speech as beyond the reach of the school, thereby ending the analysis. Others first examine the nexus between the speech and the school to decide whether the speech can be deemed "on campus." These courts then apply one or more of the standards from the Supreme Court decisions to determine if the speech can be proscribed.

Section IV re-examines the court decisions and provides an organizational tool illustrating how all student speech can be analyzed, regardless of where the speech originates. The terms "on campus" and "off campus" are unnecessarily distracting and overemphasize location at the expense of other factors. While students do not shed their constitutional rights at the schoolhouse gate, neither *Tinker* nor any subsequent Supreme Court decision has explicitly limited the disciplinary reach of a school to campus. The place of the speech is a factor that can impact a school's ability to discipline a student for speech, but it is not determinative. The ability of a school to proscribe speech depends on the content and the effect of the speech. These two factors must be considered when evaluating whether a school can proscribe speech, regardless of where the speech originates. A new standard to evaluate Internet speech is unnecessary; instead, what is needed is a re-thinking of the current standards.

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have occurred. For examples of courts using the rights/privileges discussion in speech cases, see *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 222 (D. Conn. 2009) ("[I]t is not at all clear that participation in extracurricular activities should be considered a right at all."). *See also* Lowery v. Euverard, 497 F.3d 584, 599–600 (6th Cir. 2007) (upholding a school's decision to remove students from the football team for signing a petition advocating for the removal of the football coach).

[24] This was the method that one high school used to suspend, for forty days, students involved in filming and posting a YouTube video of a teacher. Requa v. Kent Sch. Dist., 492 F. Supp. 2d 1272, 1274 (W.D. Wash. 2007). The video contained close shots of the teacher's behind (with the words, "Caution: Booty Ahead," appearing on screen), students making pelvic thrust moves behind her, and panoramic shots of her disorganized classroom. *Id.* The school argued that the discipline was not for the speech, but for the conduct of secretly recording the teacher—and the district court agreed. *Id.* at 1283. The film ("Mongzilla") can be viewed at http://www.youtube.com/watch?v=aHIJMWr1Zy0 (last accessed Apr. 3, 2010).

## II. THE SUPREME COURT: WHAT IT SAYS, AND DOES NOT SAY, ABOUT STUDENT FREE SPEECH

### A. *Overview of Decisions*

#### 1. Tinker v. Des Moines Independent Community School District

In *Tinker v. Des Moines Independent Community School District*, a group of students wore black armbands to school to protest the Vietnam War.[25] The school suspended the students, who, in turn, challenged the constitutionality of the school district's action.[26] The Supreme Court found for the students, famously stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[27]

The Court stressed that mere dislike of what a student says cannot justify restrictions on student speech, nor can undifferentiated fear be sufficient for a school to restrict speech.[28] The Court was concerned that the school officials seemed to have acted with "an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam."[29] But it also noted that the First Amendment rights of students must be "applied in light of the special characteristics of the school environment."[30] Thus, the Court set forth the rule that schools can infringe upon students' freedom of speech only when the school can prove that the speech caused—or could have caused—a substantial disruption or an invasion of the rights of others.[31]

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[25] 393 U.S. 503, 504 (1969).

[26] *Id.*

[27] *Id.* at 506.

[28] *Id.* at 508–09.

[29] *Id.* at 510–11.

[30] *Id.* at 506.

[31] *Tinker*, 393 U.S. at 514. Although lower courts typically refer to *Tinker* as requiring a substantial disruption, the *Tinker* Court made it clear that authorities could act to discipline offending speech if they could "demonstrate any facts which might reasonably have led [them] to forecast substantial disruption or material interference with school activities." *Id.*; *see also* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (noting that schools have a duty to prevent disturbances and that "*Tinker* does not require certainty that disruption will occur."); J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 303 (3d Cir. 2010) (finding that a school appropriately disciplined a student for speech created off campus because the school established that the speech had potential to cause a substantial disruption). The second prong of *Tinker*—the interference of the rights of others—is seldom invoked, and some scholars have begun to wonder whether this prong will become more prevalent in cases dealing with Internet speech. *See* Mary-

*Tinker* is generally hailed by scholars as the high water mark of student free speech, while the subsequent Supreme Court decisions are viewed as chipping away at students' First Amendment protections.[32] But a recent comprehensive review of lower-court decisions following *Tinker* sheds doubt on its reputation as a strongly speech-protective standard. In the majority of cases decided between *Tinker* and the next Supreme Court decision addressing student speech, the courts ruled for the schools.[33]

At the time *Tinker* was decided, it was unclear whether its standard should apply to all speech or whether it should be limited to certain types of speech. Seventeen years later, the Court attempted to address this question.

### 2. Bethel School District v. Fraser

That next student speech case was *Bethel School District v. Fraser*.[34] At issue was a speech delivered at a school assembly in which Matthew Fraser, a student at Bethel High School, nominated a fellow classmate for an elective office.[35] In the speech, Fraser used sexual metaphors to describe the candidate.[36] The school suspended him for violating its policy prohibiting

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Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1094 (2008) ("[N]o court has invoked *Tinker*'s rights-of-others prong as the sole basis for upholding restriction on student speech in the digital media . . . . [I]t is unclear whether this relatively obscure aspect of Tinker should play a role in any student speech cases, digital or not."); *see also* Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 866 (2008) (noting that "suppressing speech to protect the 'rights of other students' remains a wild card.").

[32] Denning & Taylor, *supra* note 31, at 840 (the authors provide a comprehensive listing of scholarly comments on *Tinker*'s broad protection of student free speech.).

[33] Nuttall, *supra* note 16, at 1300 n.100 (drawing on his Westlaw review of forty-eight federal cases and finding that in only nineteen cases did the courts hold for the student). Nuttall argues that *Tinker*, properly read, affords great discretion to school officials in determining the potential consequences of speech, thereby undermining the claim that *Tinker* is highly protective of student speech. *Id.* at 1282. According to Nuttall, *Morse* is likewise deferential to school administrators. *See id.* at 1291–92 (citing Morse v. Frederick, 551 U.S. 393, 400–01 (2007)). The difference troubling Nuttall is that he sees the deference as warranted in *Tinker* because school officials are in the best position to determine what creates a substantial disruption; whereas in *Morse*, the issue is whether speech is advocacy, a question, Nuttall argues, that should be left to the courts instead of the schools. *Id.* at 1310.

[34] 478 U.S. 675 (1986).

[35] *Id.* at 677.

[36] *Id.* at 687 (Brennan, J., concurring). Fraser, in describing the candidate, made comments such as, "'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm." *Id.*

conduct that interfered with the educational process, "including the use of obscene, profane language or gestures."[37]

The Supreme Court held that the school could discipline the student for lewd and offensive speech.[38] The Court reversed the decision of the lower court, which had employed a *Tinker* analysis in finding that because the speech did not cause a substantial disruption, the suspension violated Fraser's free speech right.[39]

*Fraser* is not entirely clear as to how it reached its decision.[40] The Court began by noting that the lower court did not place enough weight on the "marked distinction" between political speech and lewd speech.[41] "Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."[42] The Court also emphasized a school's interest in protecting minors from vulgar and offensive language and found that a "high school assembly or classroom is no place for a sexually explicit monologue directed toward an unsuspecting audience."[43]

Significantly, however, *Fraser* never explicitly applied *Tinker*. The Court did note that Fraser's speech was "plainly offensive to both teachers and students," that it "could well be seriously damaging to its less mature audience," and that some students were "bewildered by the speech and the reaction of mimicry it provoked."[44] Nonetheless, the Court never directly stated that Fraser's "seriously damaging" speech caused a substantial disruption or interference with the rights of others.[45]

It was thus unclear as to which, if any, of the three factors—the lewd, vulgar speech; the large, captive audience; or the effect that the speech had on students—was the determining factor for the Court in *Fraser*.

### 3. Hazelwood School District v. Kuhlmeier

Less than two years after *Fraser*, another student speech case made it up to the Supreme Court. In *Hazelwood School District v. Kuhlmeier*, the Court

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[37] *Id.* at 678.

[38] *Id.* at 675. The Court did also note that the speech was not obscene under the definition from *Miller v. California*, 413 U.S. 15, 23 (1973).

[39] *Fraser*, 478 U.S. at 680–81.

[40] "The mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404.

[41] *Fraser*, 478 U.S. at 680.

[42] *Id.* at 685.

[43] *Id.* at 684–85.

[44] *Id.* at 683.

[45] *See, e.g.*, Papandrea, *supra* note 31, at 1048.

upheld a school's decision to censor the school newspaper.[46] Whereas *Fraser* was vague about whether it was applying *Tinker* or creating its own standard, *Kuhlmeier* was crystal clear: "[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[47] As a result of *Kuhlmeier*, school-sponsored speech can be restricted when the limitation is reasonably related to a legitimate pedagogical concern.[48] Of the Supreme Court decisions involving student speech, *Kulhmeier* is arguably the easiest to apply: if the speech appears to bear the school's imprimatur, a school can censor it for a reasonable educational purpose.[49]

In addition to establishing a new student speech standard, *Kulhmeier* also—in a footnote—explained that there was indeed a difference between the analyses used in *Tinker* and *Fraser*: "The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrup[t] class work or involv[e] substantial disorder or invasion of the rights of others.'"[50]

But although *Kuhlmeier* noted this distinction, it did not fully answer the *Fraser* conundrum: was Fraser's speech censored only based on its content, or did the effect of the speech—even if it did not rise to a *Tinker* level—play a role? And if the effect did play a role, how important was it to the Court's decision?

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[46] 484 U.S. 260, 274 (1988). The paper was published as part of a journalism class. *Id.* at 262. The principal had removed two student articles from the paper. *Id.* at 264. One dealt with teenage pregnancy at the school, and the principal expressed concern that although the story did not name the pregnant students, they could be easily identified. *Id.* at 263. The principal also censored a story about divorce because a student commented on the effects of her parents' divorce, but the parents were not given an opportunity to respond to the student's remarks. *Id.*

[47] *Id.* at 272–73.

[48] *Id.* at 271. There has not been much confusion over what constitutes "school-sponsored" speech. *Kuhlmeier* defined it as expressive activity that "students, parents, and members of the public" might perceive as bearing the school's "imprimatur." *Id.* at 271. Courts, however, vary considerably as to what constitutes a legitimate pedagogical concern, although they are generally quite deferential to school districts under *Kuhlmeier*. For example, in *Poling v. Murphy*, the Sixth Circuit upheld a school's decision to make a student ineligible for an election after he made a rude remark because the court found the school's decision related to a legitimate pedagogical concern. 872 F.2d 757, 758 (6th Cir. 1989).

[49] For this reason, *Kuhlmeier* poses the least amount of confusion for Internet speech cases, as discussed *infra* Parts III and IV.

[50] 484 U.S. at 271–72 n.4.

### 4. Morse v. Frederick

Following *Kuhlmeier*, nineteen years passed before the Supreme Court again addressed the issue of student free speech. In *Morse v. Frederick*, the Court ruled that school officials could discipline students for speech that was reasonably viewed as promoting illegal drug use.[51]

In January 2002, the Olympic Torch Relay passed through Juneau, Alaska.[52] Deborah Morse, the principal of Juneau-Douglas High School (JDHS), allowed students to leave campus—under school supervision—to view the relay across the street from the school.[53] Joseph Frederick, a JDHS student, did not check into school that morning and instead joined his friends (all but one of whom were also JDHS students) at the event.[54] Frederick had brought with him a fourteen-foot banner reading "Bong Hits 4 Jesus" and, with help from some classmates, held it up at the relay.[55] Principal Morse confiscated the banner because she thought it encouraged the use of illegal drugs, and Frederick was suspended for violating the school drug policy.[56]

Frederick asserted that the suspension violated his right to free speech, but the Supreme Court disagreed.[57] Frederick argued that his speech was not subject to the school's authority because of its off- campus location.[58] The court quickly dismissed this argument: "At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question."[59]

In evaluating the actions of Principal Morse in disciplining Frederick's speech, the Court noted that "not even Frederick argues that the banner conveys any sort of political or religious message."[60] The Court thus found

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[51] 551 U.S. 393, 409–10 (2007).

[52] *Id.* at 397.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Morse*, 551 U.S. at 397.

[58] "There is, nonetheless, ample basis in this record to conclude that this is not a student speech case at all. As previously noted, Frederick had never even arrived at school when he unfurled his banner. He intentionally positioned himself across from the school so that he was not standing on school property. The Olympic Torch Relay was a public event on a public street that was jointly sponsored by Coca-Cola and local businesses." Brief of Respondent-Appellee at 34, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278), 2007 WL 579230 (citations omitted).

[59] *Morse*, 551 U.S. at 400.

[60] *Id.* at 403.

that it was "plainly not a case about political debate. . . ."[61] Drug use, the Court explained, is a widespread problem in the schools, and deterring its use among school children serves an important interest.[62] The banner could have been reasonably interpreted as promoting illegal drug use, and the "First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[63]

The Court reached this decision without finding that a substantial disruption had occurred, explaining that a complete analysis should not be limited to *Tinker*. *Morse* drew on *Fraser* for two key principles: the rights of students are not coextensive to those of adults, and the "mode of analysis set forth in *Tinker* is not absolute."[64]

*Morse* is the Supreme Court's last word on student free speech. As with other Supreme Court holdings on student speech, it is unclear how broadly its decision should be interpreted. The Court emphasized the important role that schools have in preventing advocacy of illegal drug use, but some lower courts have endorsed a more expansive reading.[65]

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[61] *Id.* *Morse* also emphasized that "[p]olitical speech, of course, is 'at the core of what the First Amendment is designed to protect.'" *Id.* (citing Virginia v. Black, 538 U.S. 343, 365 (2003)).

[62] *Id.* at 407. The Supreme Court has also pointed to the widespread problem of drug use in schools to find that the drug testing of students in extracurricular activities is not in violation of the Fourth Amendment. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995).

[63] *Morse*, 551 U.S. at 410.

[64] *Id.* at 405. *Morse* also notes that the *Fraser* holding was not entirely clear in terms of the relative importance of the content of the speech and the format of the speech in its decision to uphold the student's discipline. *Id.* at 404. The *Morse* Court points the "marked distinction" *Fraser* noted between political and vulgar speech, but it also cites to Justice Brennan's concurrence in *Fraser*, who suggested that "school officials sought only to ensure that a high school assembly proceed in an orderly manner." *Id.* (citing *Fraser*, 478 U.S. at 689 (Brennan J., concurring)). But as the *Morse* Court found, "[w]e need not resolve this debate to decide this case." *Id.*

[65] Justice Alito, in a concurring opinion, seemed particularly adamant about limiting the scope of the holding: "I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits." *Id.* at 425 (Alito, J., concurring). Some courts, however, have already taken a more expansive reading. In *Boim v. Fulton County School District*, the court found that *Morse* "applies equally, if not more strongly, to speech reasonably construed as a threat of school violence" in a case upholding the suspension of a student who wrote in a notebook of her desire to shoot her teacher. 494 F.3d 978, 984 (11th Cir. 2007). For a brief discussion of recent cases taking a more expansive reading of *Morse*, see Papandrea, *supra* note 31, at 1053.

## B. *The Aftermath: Unanswered Questions in the Wake of the Supreme Court Decisions*

Although the Court has provided some guidance on how a school can discipline student speech, there is confusion about when and why it can do so. An initial concern—somewhat settled in *Morse*—was whether *Fraser* altered the *Tinker* inquiry, or whether it had created its own standard.[66] Was *Fraser* saying that a *Tinker* analysis was not necessary for certain types of speech deemed inappropriate, or that certain types of inappropriate speech were per se disruptive?[67] The opinion itself seemed to support the view that *Fraser* was an extension. [68] But *Kuhlmeier* implied in a footnote that *Fraser* was an exception to *Tinker*.[69] *Morse*, drawing from this footnote, found that *Tinker* is not the only standard to apply and that *Fraser* established a separate inquiry.[70]

From these four Supreme Court decisions come ways in which schools can discipline students for speech: if, as explained in *Tinker*, the speech caused or could cause a substantial or material disruption or an interference with rights of others; if, as in *Fraser*, it is lewd or vulgar; if, as in *Kuhlmeier*, the speech could be interpreted as representing the school; or if, as in *Morse*, it advocates illegal drug use. The varying details and contexts of these cases have created some challenges on determining when and how limits can be applied to student speech. The confusion has become dramatically more apparent as courts and schools struggle to apply these four cases to student Internet speech that originates off of school property. An approach that may be useful is to evaluate the four cases collectively in their consideration of four factors: effect, content, sponsorship, and location.

Effect was the critical concern noted by the court in *Tinker*, which held that the school violated the students' rights because it failed to demonstrate that the speech caused or could have caused a substantial disruption.[71] But effect was also a concern in the other cases. *Fraser* noted that the speech was offensive and potentially damaging.[72] *Kuhlmeier* expressed concern about how speech bearing the school's imprimatur could interfere with the

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[66] Denning & Taylor, *supra* note 31, at 839.

[67] Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 987.

[68] As scholars have noted, "[W]hy else would the Court have discussed the extent to which Fraser's speech caused disruption both at the assembly and in classes afterward?" Denning & Taylor, *supra* note 31, at 860.

[69] *Kuhlmeier*, 484 U.S. at 271–72 n.4.

[70] *Morse*, 551 U.S. at 404–05.

[71] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[72] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

pedagogical function of schools.[73] Finally, *Morse* worried about the banner's potential for it to be interpreted as promoting drug use and expressed concerns about the psychological effects of drugs.[74]

Content was clearly a defining factor in *Fraser* and *Morse*.[75] But in *Tinker*, it also played a role, as the Court emphasized the political nature of the speech.[76] And in *Kuhlmeier*, the Court provided schools with wide control over content, allowing censorship of school-sponsored speech for any legitimate educational reason.[77]

Sponsorship was clearly a main concern in *Kuhlmeier*.[78] In the other cases, however, the speech was not school-sponsored, so that factor was not relevant to the decision.[79]

Location was specifically highlighted in the *Tinker* decision. *Tinker*, *Fraser*, and *Kuhlmeier* all involved speech that clearly took place within the "schoolhouse gate."[80] The *Tinker* students wore their armbands to school, the student in *Fraser* delivered his speech at a school assembly, and the newspaper in *Kuhlmeier* was produced as part of the school's journalism class. Although Frederick did not unfurl his banner on the school grounds, the Court in *Morse* wasted no time in addressing whether it was a "school

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[73] 484 U.S. at 271. The Court explained that teachers "are entitled to exercise greater control" over school-sponsored expression to ensure that "participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.*

[74] 551 U.S. at 407.

[75] *Fraser*, 478 U.S. at 68–81; *Morse*, 551 U.S. at 393.

[76] 393 U.S. at 510–11.

[77] 484 U.S. at 270–73.

[78] *Id.* at 271.

[79] The school in *Morse* did argue that the banner could have been viewed as being associated with the school and thus subject to *Kuhlmeier*. Brief for Petitioner at 32–35, 551 U.S. 393 (No. 06-278). The Supreme Court rejected this argument, finding "*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." 551 U.S. at 405. But for an interesting article on this topic, see Murad Hussain, *The "Bong" Show: Viewing* Frederick*'s Publicity Stunt Through* Kuhlmeier*'s Lens*, 116 YALE L.J. POCKET PART 292 (2007). Hussain differentiates between the "purely intra-school discourse" of *Fraser* and *Tinker* and the more publicly directed speech of *Kuhlmeier* and *Morse*. *Id.* at 298. He contends that some school activities are for "the education and enjoyment of student participants and public audiences alike" and that in these public activities, the schools function as "civic institutions engaging the citizens who support them." *Id.* The Olympic Torch Relay in *Morse* could be viewed "as an opportunity for the school, through its students, to express its commitment to the wider community." *Id.* It would thus be considered school-sponsored, and Frederick's stunt—aimed to capture the attention of the media—would have been subject to school discipline under *Kuhlmeier*. *Id.* at 299–300.

[80] *Kuhlmeier*, 393 U.S. at 506.

speech" case: the principal had granted permission for the students—under school supervision—to attend the event.[81] The *Morse* decision was thus the first to expand the disciplinary arm of the school beyond the physical schoolhouse gate.

Application of these four Supreme Court cases by lower courts has been inconsistent, particularly with regard to Internet speech. A frequent challenge is the question of location: Specifically, does a school have the authority to proscribe speech that originated off campus? If a school does have that authority, which of the different Supreme Court standards apply? With these questions unanswered, the lower courts have employed a dizzying array of approaches to evaluate student Internet speech, resulting in what has been described as a "state of tumult about the precise scope of First Amendment rights possessed by students."[82]

## III. CONFUSION BELOW: LOWER COURTS STRUGGLE WITH INTERNET SPEECH

Because the *Morse* Court found that the Bong Hits 4 Jesus poster was at a school-sponsored event, and thus student speech, it did not need to address whether—and if so, to what extent—schools can censor speech originating outside of school. *Morse* simply acknowledged that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . ."[83]

This uncertainty is now faced by the lower courts.[84] With no clear understanding of when and how to evaluate Internet speech, the courts, as a result, have used an inconsistent application of standards and tests to the cases before them.

At the outset, it must be noted that the cases involving school-sponsored speech generally do not pose issues for schools. *Kuhlmeier*'s main concern is

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[81] *Morse*, 551 U.S. at 400; *see also* Pike, *supra* note 67, at 985 (discussing how the Court "almost offhandedly" dismisses Frederick's claim that it was not a school speech case and "dedicates a single paragraph to the idea that even though Frederick arrived independently, during an off-campus school-sponsored event, his activity still invoked an on-campus student speech analysis").

[82] Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1139 (2003).

[83] 551 U.S. at 401.

[84] A recent law review article explains the conundrum well: "Since most material is produced off campus, school officials are unsure how far their authority to regulate extends. On the other hand, given the fact that schools are awash in gadgets that permit students to access the Internet, text message or e-mail one another, and send pictures and video, the line between on-campus and off-campus speech is blurring. It is becoming difficult to keep speech out of schools, even if schools (and perhaps the speaker) want to." Denning & Taylor, *supra* note 31, at 837.

whether the speech bears the school's imprimatur; under this standard, analyzing Internet speech cases does not differ greatly from other situations. For example, if a student created a website during class, or on a school computer, *Kuhlmeier* would apply, allowing a school to proscribe the speech for a legitimate pedagogical concern.[85] The larger challenge for schools involves speech created off of school property that is not school-sponsored, but that still might be considered student speech.

Some courts have determined that Internet speech created outside of school cannot be subject to discipline by the school.[86] Increasingly, however, courts are finding that schools can discipline students for Internet speech created outside of school when there is a sufficient nexus between the speech and the campus of the school.[87] But the courts vary in terms of the factors they use—and the weight placed on each factor—to determine whether a sufficient nexus has been established.

Some courts use a narrow, geographical approach, finding that in order to be under the school's authority, it must have been accessed at school or brought to campus in hard copy. [88] Other courts look beyond the physical nature of the speech, using a more expansive analysis that examines whether the student directed the speech at the school, whether the speech was intended to be accessed at school, and/or whether it was reasonably foreseeable that the speech would come to the attention of the school.[89]

Further complicating matters, these courts also differ on which standards to apply if the speech is considered student speech. Some will only engage in a *Tinker* analysis, while others will also analyze under *Fraser* and examine the content of the speech to determine whether it is lewd or vulgar. Some might also use *Morse*.[90] These differences can occur regardless of whether the court used the more narrow geographical approach or a more expansive one.[91]

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[85] *Id.* at 889.

[86] *See, e.g.*, Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *see also* Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 265 (2008) ("The majority of courts . . . have found that Internet speech created off campus cannot be subject to the jurisdiction of school disciplinary action.").

[87] RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION, 1 EDUCATION LAW § 2:26 (2004).

[88] Papandrea, *supra* note 31, at 1056. For courts focusing on this "territorial" approach, most find that speech created off campus cannot become on-campus speech simply because a third-party brings it to school or accesses it at school. *Id.* at 1057.

[89] *Id.* at 1059.

[90] It is unclear at this point whether schools may also invoke *Morse* in dealing with speech generally deemed off campus. Conn, *supra* note 13, at 12.

[91] Papandrea, *supra* note 31, at 1056.

This section looks at how courts analyze cases involving Internet speech created off campus. It begins by examining decisions that first examine whether there is a sufficient nexus between the speech and the school. The cases are separated into those that use a narrow, geographical approach and those that take a more expansive one. Next, this section looks at one case that started with the *Tinker* standard without first determining whether the speech was student speech. Finally, a chart summarizes the cases and the approaches used by the courts, and a few key points are noted.

## A. *How Courts Approach Internet Speech Originating off School Property*

### 1. *The Geographical Approach*

The geographical approach is arguably the easiest one courts can employ to determine whether Internet speech created off school campus can be subject to school discipline. This approach looks at whether a sufficient nexus exists between the speech and the school simply by determining whether the speech was physically created or ever accessed on school grounds.

In *Beussink v. Woodland R-IV School District*—generally acknowledged as the first published student Internet speech case—a student was suspended for creating from his home computer a website that criticized his principal and teachers.[92] Another student later accessed the page at school and showed it to the computer teacher, prompting the principal to suspend the student who had created the site.[93] Because of the on-school access of the speech, the court considered it to be on-campus speech and within the disciplinary reach of the school. The court then subjected the speech to a *Tinker* analysis. Finding that it did not create a substantial disruption, the court found that the punishment infringed upon the student's freedom of speech.[94]

The *Fraser* decision is never mentioned by the *Beussink* court. Although the court noted that the student had used "vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage," it did not address whether the speech could have been proscribed under *Fraser*.[95]

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[92] Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998)

[93] *Id.* at 1178.

[94] *Id.* at 1182. The court explained that "[s]peech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection." *Id.*

[95] *Id.* at 1177.

In another case, Sean O'Brien, a junior at Westlake High School, created a website criticizing his band director, Raymond Walczuk.[96] The site, called "raymondsucks.org," suggested Walczuk favored certain students and described him as "an overweight middle-aged man who doesn't like to get haircuts."[97] School officials found out about the site, accessed it at school, and suspended the student for ten days, explaining that O'Brien had violated the rule prohibiting students from disrespecting a teacher. O'Brien claimed that his free speech had been violated and filed a motion for a temporary restraining order.[98] The complaint emphasized the geographical nature of the speech,[99] explaining that had O'Brien "hurled obscenities at his teacher face-to-face on school grounds, in front of other students," the discipline might have been upheld.[100] But punishing a student for posting a website in his own time and outside of school raised the "ugly specter of Big Brother."[101] The judge granted the restraining order.[102] The parties eventually settled for $30,000, and O'Brien received an apology from the school.[103] Because the court found that the speech was off campus and beyond the reach of the school's disciplinary arm, it never had to address the issue of which Supreme Court standard would apply.

*Mahaffey v. Aldrich* involved a student who had created a website that listed people he liked, music he liked, and people he wished would die.[104] A parent saw the site, alerted the school, and the student was suspended.[105] Noting that the speech in *Tinker* occurred on school property, the *Mahaffey* court began by inquiring as to whether the speech was created or accessed at school. The court noted that the student "may have" used school computers to create part of the website but found that "the evidence simply does not establish that any of the complained of conduct occurred on [school] property."[106]

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[96] O'Brien v. Westlake City Sch. Bd. of Educ., No. 1:98CV 647 (N.D. Ohio 1998).

[97] *Id.*

[98] *See* Complaint, O'Brien v. Westlake City Sch. Bd. of Educ., No. 1:98CV 647 (N.D. Ohio 1998).

[99] *Id.* at 5.

[100] *Id.*; O'Brien v. Westlake City Sch. Bd. of Educ., No. 1:98CV 647 (N.D. Ohio 1998).

[101] Complaint at 5, O'Brien v. Westlake City Sch. Bd. of Educ., No. 1:98CV 647 (N.D. Ohio 1998).

[102] Order Granting Temporary Restraining Order, at 3 *O'Brien*, No. 1:98CV 647.

[103] *See Ohio Teen, School Officials Settle Web Site Lawsuit*, Apr. 14, 1998, *available at* http://www.freedomforum.org/templates/document.asp?documentid=9492.

[104] 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002).

[105] *Id.*

[106] *Id.* at 784.

Despite rejecting the school district's assertion that the activity occurred on campus, the *Mahaffey* court proceeded to analyze the case under *Tinker*.[107] It found that no substantial disruption took place as a result of the website's creation.[108] The speech at issue was arguably neither lewd nor vulgar. The court suggested, however, that Fraser's discipline was justified because the speech was delivered at a school assembly, and so Internet speech like Mahaffey's could not be proscribed for being lewd or vulgar.[109]

Finally, in *J.S. v. Bethlehem Area School District*, the student had created a website that made many derogatory comments about his math teacher and suggested that she was engaging in sexual relations with another teacher.[110] It provided a link to another website in which the teacher's face morphed into the face of Adolf Hitler.[111] The student's site also listed reasons why the teacher should die and asked for twenty-dollar donations so that the student could hire a hit man to do the job.[112] The teacher suffered severe emotional distress.[113] She took a medical leave for the remainder of the semester, and the school employed three substitute teachers to replace her.[114]

As in *Mahaffey*, the *Bethlehem* court began by analyzing whether the speech could be classified as on campus: "First, a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it [on-

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[107] *Id.* Because *Mahaffey* employed a *Tinker* analysis, one could read the decision as not being limited to geography. A better reading of the case, however, is that the geographical nature of the speech was sufficient for the court to deem it out of the school's reach, and the *Tinker* analysis was merely instructive as to how the court would proceed in a case where the speech did reach campus.

[108] *Id.* at 786. The intent of the student was relevant to the court, which noted that the student created the website as a joke and never meant for anyone else to see it. The court found that "[a]lthough other students did see the website, there is no evidence that they did so because Plaintiff 'communicated' the website to them or intended to do so." *Id.* As explained *infra* Part IV.B.1, an appraisal of a student's intent should taken into account the type of medium used to communicate. A student who creates an open website might not intend for large numbers of people to view it, but most students realize the ease with which sites can be discovered.

[109] 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (citing Bethel v. Fraser, 478 U.S. 675, 685 (1986)).

[110] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002) [hereinafter *Bethlehem*].

[111] *Id.*

[112] *Id.*

[113] *Id.* at 852. The teacher suffered from severe stress and anxiety and struggled with short-term memory loss. She was required to take anti-anxiety/anti-depressant medication.

[114] *Id.*

campus] speech or purely off-campus speech?"[115] The student had created the site at home but accessed it at school and showed it to another student.[116] The court thus found that a sufficient nexus was established: "where speech that is aimed at a specific school and/or its personnel is *brought onto the school campus or accessed at school by its originator*, the speech will be considered on-campus speech."[117]

The court then proceeded to determine which Supreme Court standard it should use to assess whether the school discipline infringed upon the student's right to free speech. The court noted the challenge in doing so because the speech "straddle[d] the political speech in *Tinker,* and the lewd and offensive speech expressed at an official school assembly in *Fraser.*"[118] It thus employed both *Tinker* and *Fraser* analyses and found that under either standard, the speech could be proscribed.[119]

Under *Fraser* alone, the court explained that it would easily find for the district, as it is up for schools to determine what is lewd, vulgar, or plainly offensive.[120] But the court did express some concern about using *Fraser* because the website "was not . . . expressed at any official school event or even during a class, subjecting unsuspecting listeners to offensive language."[121]

The court then moved to *Tinker* and determined that a substantial disruption had occurred: "Keeping in mind the unique nature of the school setting and the student's diminished rights therein, while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech."[122] The court noted the disruption that the speech caused to the school and students, but it focused primarily on the extreme disruption caused to the teacher, leading her to take a medical leave for the rest of the semester.[123]

As *Bethlehem* makes clear, even courts that agree to use geography as a threshold test to determine whether a school has the ability to proscribe student speech disagree on whether that ability is subject only to a *Tinker* analysis.

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[115] *Id.* at 864.

[116] *Bethlehem*, 807 A.2d at 847, 865.

[117] *Id.* (emphasis added).

[118] *Id.* at 866.

[119] *Id.* at 867.

[120] *Id.* at 868.

[121] *Id.* at 866.

[122] *Bethlehem*, 807 A.2d at 868 (internal citations omitted).

[123] *Id.* at 869.

### 2. *The Reasonably Foreseeable or Directed at School Approach*

Other courts have determined that that the disciplinary reach of a school is not strictly geographical.[124] They also consider whether a sufficient nexus is established between the speech and the school but will find such a connection if it was reasonably foreseeable that the speech would come to the attention of the school and/or if the student directed the speech to the school.[125]

In *Wisniewski v. Board of Education*, the court found that although the speech was created off campus, it was reasonably foreseeable that the teacher and other school authorities would find out about it.[126] A middle school student had made an instant messaging icon of his teacher getting shot with the words, "Kill Mr. VanderMolen."[127] The icon was created on the student's home computer. The school administration found out about the icon from another student and suspended the student for five days. In addition, the teacher requested to be transferred out of the student's class.[128] A police officer investigated and, finding the image to be a joke, dismissed the case. However, the superintendent recommended that the student be suspended for a semester, and the school board agreed.[129]

The court found that the speech "crosse[d] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[130] Once deciding to use *Tinker*, the court found that the speech did create a substantial disruption and thus upheld the student's punishment.[131] The opinion did not even mention the *Fraser* decision, let alone analyze the case under *Fraser* as well as *Tinker*.

The *Layshock* case, discussed at the beginning of this Note, took place a few years after *Bethlehem* and in the same state.[132] As in *Bethlehem*, the district court in *Layshock* also began with an inquiry into the boundaries of

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[124] Conn, *supra* note 13, at 13.

[125] Papandrea, *supra* note 31, at 1059.

[126] 494 F.3d 34, 39 (2d Cir. 2007).

[127] *Id.* at 36.

[128] Wisniewski v. Bd. of Educ., No. 5:02CV1403, 2006 WL 1741023 at *3. (N.D.N.Y. June 20, 2006).

[129] 494 F.3d at 36–37.

[130] *Id.* at 38–39. Because the icon did come to the attention of school officials, two members of the *Wisniewski* panel found that it was unnecessary to consider in that case whether it was reasonably foreseeable that the speech would come to the attention of the school. *Id.* at 39.

[131] *Id.*

[132] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

the school district's authority. But *Layshock* differed in how the court determined what constituted student speech and, if the speech were to be considered student speech, which Supreme Court standards should apply.

*Layshock* began by explaining that the test for determining school authority is not strictly geographical and that the mere presence of the speech on campus does not provide the school with authority to discipline.[133] Although the reach of school administrators is not limited to a school's physical property, the court found that there must be an appropriate nexus between the speech and the school in order for the school to discipline a student for speech.[134] In examining the nexus, the court noted that the only in-school conduct Justin, the student, had engaged in was showing the profile to other students in a class. The court explained that while "this conduct, in theory, might support the punishment issued by the administration," the school also had to clear the *Tinker* test, which it failed to do.[135] According to the court, no reasonable jury could have found that a substantial disruption had occurred: "no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."[136]

Also, whereas the court in *Bethlehem* analyzed the facts under both *Tinker* and *Fraser,* the district court in *Layshock* declined to perform a *Fraser* analysis, despite finding with "no difficulty" that the profile Justin had created was "lewd, profane and sexually inappropriate."[137] The court explained:

> [T]he rule in *Fraser* may be viewed as a subset of the more generalized principle in *Tinker*, i.e., that lewd, sexually provocative student speech may be banned without the need to prove that it would cause a substantial disruption to the school learning environment. However, because *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school. In sum, the *Fraser* test does not justify the Defendants' disciplinary actions.[138]

The court addressed *Bethlehem* in its discussion, recognizing that the case was "on point," but it nevertheless reached "a slightly different balance

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[133] *Id.* at 598.

[134] *Id.* at 601. The court added that "[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web." *Id.* at 597.

[135] *Id.*

[136] *Id.* at 600 (citing *Tinker*, 393 U.S. at 517–18 (Black, J., dissenting)).

[137] 496 F. Supp. 2d at 599.

[138] *Id.* at 599–600.

between student expression and school authority."[139] Notably, the district court opinion in *Layshock* also emphasized that "[t]he content of the website, and its impact on school personnel, was much more extreme in [*Bethlehem*] than in this case."[140]

On appeal to a three-judge panel on the Third Circuit, the school district in *Layshock* did not challenge the district court's finding that there was not a sufficient nexus between the speech and the disruption.[141] Instead, the school argued that a sufficient nexus existed because Justin had used a photo of the principal from the school website in the fake profile, and that by doing so, he "entered" the school's property.[142] But the panel disagreed: "The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it."[143]

The Third Circuit panel also found that the relationship between the student's conduct and the school was too attenuated to support his suspension.[144] Although the panel recognized that "*Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the

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[139] *Id.* at 602.

[140] *Id.* As discussed *infra* Part IV, content and school effect should be the key factors courts use to determine a school's ability to proscribe the speech. Based on these factors, the different outcomes in *Layshock* and *Bethlehem* make sense. But some scholars place less emphasis on these factors and thus have difficulty reconciling these two decisions. *See, e.g.*, Kyle W. Brenton, *BONGHiTS4JESUS.COM?: Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1220 (2008) (finding that *Bethlehem* and *Layshock* "present identical operative facts: web content created off campus that was accessed by the author on campus" and suggesting that the divergence in outcome "suggests a need for uniform standards whereby judges may determine the limits of school authority over student cyberspeech")

[141] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 258–59 (3d Cir. 2010).

[142] *Id.* at 259. The school district argued that "[t]he 'speech' initially began on campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The 'speech' was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School district and the Principal." *Id.* at 259 (citation omitted).

[143] *Id.*

[144] *Id.* at 260. The *Layshock* panel drew heavily on *Thomas v. Board of Education*, 607 F.2d 1043, 1050 (2d Cir. 1979), in which the school district was found to have violated the First Amendment rights of students who had made a satirical newspaper where most of the creation and distribution occurred off school property. *Layshock*, 593 F.3d at 259. The *Thomas* court rested in large part on "the supposition that the arm of authority does not reach beyond the schoolhouse gate" although it did imply that schools might be able to discipline students who "incite[] substantial disruption within the school from some remote locale." 607 F.2d at 1044–45, 1052 n.17.

school yard," it expressed concern about setting "an unseemly and dangerous precedent" allowing the school to "reach into a child's home and control his/her actions there to the same extent they can control that child when he/she participates in school-sponsored activities."[145]

The school district also failed in its argument that the website was lewd and vulgar and thus, under *Fraser*, had no First Amendment protection.[146] The court found that that *Fraser* only applied to school speech[147] and that Layshock's speech was "out of school expressive conduct."[148]

In another case involving a fake profile of a school official, however, the court came out "on the other side of what the [*Layshock*] court deemed to be 'a close call.'"[149] In *J.S. ex rel. Snyder v. Blue Mountain School District*, two students had created a fake MySpace profile of the school principal, claiming that the principal was a pervert and a sex addict. [150] The students created the site during non-school hours using a computer at the home of one of the students.[151] The district court found that the students had directed the speech toward the school, thereby establishing a sufficient nexus:

> The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code.[152]

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[145] *Layshock*, 593 F.3d at 260.

[146] *Id.* at 263. The school district supported its arguments with three cases discussed in this Note: J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (discussed *supra* Part III.A.1); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007) (discussed *infra* Part III.A.2); and Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (discussed *infra* Part III.A.2). The *Layshock* panel distinguished each case, explaining that "schools may punish expressive conduct that occurs outside of school as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here." 593 F.3d at 263.

[147] *Layshock*, 593 F.3d at 261 n.16.

[148] *Id.* at 263.

[149] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07CV585, 2008 WL 4279517, at *8 (M.D. Pa. Sept. 11, 2008) (citing *Layshock*, 496 F. Supp. 2d at 601) [hereinafter *Blue Mountain*].

[150] *Id.* at *1. The court's opinion includes much of the content from the fake profile, including, "It's your oh so wonderful, hairy, expressionless, sex addict, fa [sic] ass, put on this world with a small dick PRINCIPAL Rave come to myspace so I can pervert the minds of other principals to be just like me." *Id.*

[151] *Id.*

[152] *Id.* at *7.

The court then analyzed the case under both *Tinker* and *Fraser*, finding that "the *Tinker* analysis . . . is not always applicable to freedom of speech in public school settings. A school can validly restrict speech that is vulgar and lewd and also it can restrict speech that promotes unlawful behavior."[153] The court focused on the content of the speech, distinguishing the "vulgar and offensive statement ascribed to the school principal" from the political speech protected in *Tinker*.[154] Although the court found that the disruption to the school was not substantial enough to be proscribed under *Tinker*, it could be proscribed under *Fraser* due to its lewd and vulgar content.[155]

On appeal, the Third Circuit panel affirmed the lower court's decision, but it used only *Tinker* to do so, thereby avoiding the need to perform a *Fraser* analysis. The court "decline[d] . . . to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect [on campus] because we conclude that the profile at issue, though created [off campus], falls under the realm of student speech subject to regulation under *Tinker*."[156]

In its *Tinker* analysis, the court agreed with the district court that the minor disruptions to the school—students talking about the profile in class, the principal arranging meetings about it, etc.—did not amount to a substantial disruption.[157] The panel, however, found that such a disruption *could have* occurred had it not been for the school's prompt investigation and removal of the fake profile.[158] The court was thus "sufficiently persuaded that the profile presented a reasonable possibility of a future disruption"[159] for reasons including that students would discuss the profile with their

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[153] *Id.* at *6.

[154] *Blue Mountain*, 2008 WL 4279517 at *4.

[155] *Id.* at *7.

[156] J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 298 (2d Cir. 2010). This decision was handed down by a different three-judge panel of the Third Circuit on the same day that the *Layshock* opinion was delivered. The *Blue Mountain* panel acknowledged the seemingly contradictory *Layshock* opinion but distinguished it by emphasizing that the school district in *Layshock* had never established a sufficient nexus between the speech and the school. *Id.* at 302–03 n.11. In contrast, the *Blue Mountain* panel explained, the nexus between the student speech and the possibility of a substantial disruption in the school environment "is the basis of our holding in the instant case." *Id.* That panel did not question the district court's finding that a nexus had been established because the speech was directed at the school. In *Layshock*, on the other hand, the school district did not challenge on appeal the district court's finding regarding the lack of a sufficient nexus between the speech and the school; it instead argued—unsuccessfully—that a nexus existed because Justin Layshock had used a photo from the school website on the profile he created. *Layshock*, 593 F.3d 249, 258–59 (3d Cir. 2010).

[157] *Blue Mountain*, 593 F.3d at 299.

[158] *Id.* at 300.

[159] *Id.*

parents and that "students and parents inevitably would have begun to question [the principal's] demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children, on account of the profile's contents."[160]

The court rejected the student's argument that *Tinker* should be limited to the physical campus of a school, explaining that "off-campus speech that causes or reasonably threatens to cause a substantial disruption or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[161] Finally, although the court's finding under *Tinker* rendered it unnecessary to consider the application of *Fraser*, the court explained that it could not "overlook the context of the lewd and vulgar language contained in the profile," especially given the "inherent potential of the Internet to allow rapid dissemination of information."[162]

The Second Circuit has also struggled with *Fraser*'s applicability to Internet speech originating off campus. In *Doninger v. Niehoff*, school administrators banned a Connecticut high school student from running in a student election after she posted on a blog that her principal was a "douchebag."[163] The post came in response to the student's belief that the principal had cancelled JamFest, a popular event.[164] Avery Doninger, the student, used the blog post to encourage people to call the school administrators and complain.[165]

The district court denied Doninger's motion for a preliminary injunction, first finding that it was reasonably foreseeable that the speech would come to the attention of the school: "the content of the blog was related to school issues, and it was reasonably foreseeable that other [students at the school]

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[160] *Id.* at 301.

[161] *Id.*

[162] *Id.* Thus, although the Third Circuit panel in *Blue Mountain* avoided *Fraser* in reaching its decision, its opinion suggests that the lewd and vulgar content of the profile made it more possible that the speech could have had a disruptive effect at school. As discussed *infra* Part IV, content and effect are the two most important factors to be used in assessing whether speech made off school campus should be subject to discipline.

[163] Doninger v. Niehoff, 514 F. Supp. 2d 199, 206 (D. Conn. 2007).

[164] *Id.* Karissa Niehoff, the principal, asserted that the student's blog post was false because the event had not been cancelled, but merely postponed. *Id.* at 205.

[165] The student posted the following on her blog: "jamfest is cancelled due to douchebags in central office . . . basically, because we sent [the original Jamfest email] out, Paula Schwartz is getting a TON of phone calls and emails and such . . . however, she got pissed off and decided to just cancel the whole thing all together, anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do[,] it is going to be after the talent show on may 18th." *Id.* at 206.

would view the blog and that school administrators would become aware of it."[166] The court also noted that the school officials did discover the entry, and that the content of the blog indicated that she knew other school community members would read it. The court explained that "she chose the blog as a means of communicating her displeasure with the administration's decisions and encouraging others to contact school officials with their own opinions, a choice that would have been senseless if no other students were likely to receive her message."[167]

The court then determined that, under *Fraser*, the school could censor speech deemed vulgar, offensive, or otherwise contrary to the school's mission, without having to show a substantial disruption.[168] Notably, however, the court emphasized that Doninger's punishment was not a suspension or expulsion. Recognizing that the Supreme Court has afforded much discretion to school districts in deciding whether students may participate in extracurricular activities, the court pointed out that Doninger "does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators."[169]

The Second Circuit affirmed the district court's ruling, finding that that the blog post posed a "substantial risk that [school administrators] and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancellation."[170] The court noted that if *Fraser* could apply, there would be no question that the school officials could have prevented Doninger from running for class secretary.[171] But although the court questioned whether *Fraser* could be applied to speech that had originated off campus, it found no need to resolve that issue because Doninger's speech could be proscribed under *Tinker*.[172] In doing so, the Second Circuit noted that the blog was "plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy" and that

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[166] *Id.* at 217.

[167] *Id.*

[168] *Doninger*, 514 F Supp. 2d at 213. The court explained that "*Fraser* and *Morse* teach that school officials could permissibly punish [Doninger] in the way that they did for her offensive speech in the blog, which interfered with the school's 'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse.'" *Id.* at 217 (citing *Fraser*, 478 U.S. at 683).

[169] *Id.* at 213, 216.

[170] Doninger v. Niehoff, 527 F.3d 41, 51–52 (2d Cir. 2008).

[171] *Id.* at 49.

[172] *Id.* at 49–50.

it contained "at best misleading and at worst false information" regarding an event that was of great interest to the school community.[173]

In January 2009, the two parties returned to the district court, with Donniger introducing new evidence that supported the fact that her punishment was for the content of her speech, rather than for the potential of the speech to be disruptive.[174] The court acknowledged that the new evidence presented an issue of material fact that could alter how the decision would come out under a *Tinker* analysis.[175] Nonetheless, the court granted summary judgment for the school district, finding that the school officials were entitled to qualified immunity. The court noted that the question of whether *Fraser* applied to off- campus speech was not clear when the school disciplined Doninger, and that "it is not even clearly established today given the fact that the Second Circuit explicitly refused to decide the issue in this very case."[176] As the court explained, "[i]f courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators, such as Defendants, to predict where the line between on- and off-campus speech will be drawn in this new digital era."[177]

### 3. *The "Standard First" Approach*

Finally, at least one court first applied the Supreme Court standards before determining whether the speech is student speech. In *Killion v. Franklin Regional School District*, student Zachary Paul was suspended for emailing a "top ten" list about the school's athletic director, containing comments such as "[b]ecause of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade."[178] Zachary had created the list at home, but the speech was brought to school by a third party, and he was suspended for ten days. He brought charges against the school, claiming his free speech and due process rights had been violated.

The court granted summary judgment for the student. Without first determining whether the speech was student speech, the court applied *Tinker*

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[173] *Id.* at 50–51 (quoting *Doninger*, 514 F. Supp. 2d at 202.).

[174] Doninger v. Niehoff, 594 F. Supp. 2d 211, 219–20 (D. Conn. 2009). As the court noted, the school "did not even discover the blog entry until weeks after the Jamfest incident had been resolved, at which point there was no longer any potential for disruption." *Id.* at 220.

[175] *Id.*

[176] *Id.* at 222.

[177] *Id.* at 224. In making this point, the court cites from numerous law review articles, including many discussed in this Note, that comment on the confusion among lower courts. *Id.* at 223–24.

[178] 136 F. Supp. 2d 449, 457 (W.D. Pa. 2001).

and found that the list had not created a substantial disruption. At most, the speech was upsetting to the athletic director, but the court found that "the absence of threats or actual disruption lead us to conclude that [the student's] suspension was improper."[179]

The court then did a *Fraser* analysis and found that the speech was lewd. Had Zachary uttered the speech at school, the court explained, perhaps the school could have acted, but because it was created off campus, he could not be disciplined.[180] The court stated that "courts considering lewd and obscene speech occurring off school grounds have held that students cannot be punished for such speech, absent exceptional circumstances" and cited other cases where students' punishments were improper when the speech occurred off campus.[181]

The *Killion* court did not first assess whether the speech was under the authority of the school. While it found that *Fraser* could not apply because the speech occurred off campus, it is not clear how the off-campus nature of the speech would have affected the court's analysis if a substantial disruption had been found.

### B. *Charting the Chaos*

As shown, the lower courts differ greatly in their treatment of cases involving off-campus Internet speech. They cannot agree as to how to determine what speech is "student speech" and thus subject to any of the Supreme Court analyses. But they also disagree as to which analyses apply once the speech is considered school speech. While some only apply *Tinker*,

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[179] *Id.* at 455 (citing Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000)).

[180] The court distinguished *Emmett* from *Donovan v. Ritchie*, 68 F.3d 14 (1st Cir. 1995), in which a student's punishment for off-campus speech was upheld. In *Donovan*, as the *Killion* court explained, "the student admitted his involvement in copying (off campus) and transporting 'The Shit List,' which contained crude descriptions, insulting comments and epithets about 140 named students." 136 F. Supp. 2d at 457–58 (citing *Donovan*, 68 F.3d 14 (1st Cir. 1995)). The *Killion* court found that the evidence did not support the claim that Paul brought the list onto school grounds. This, coupled with a lack of a substantial disruption, resulted in its finding that the school's suspension of Paul violated his constitutional right. *Id.* at 458.

[181] *Id.* at 456–57 (citing Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986)); *see also* Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979). In *Klein*, a student was suspended for ten days for giving a teacher the middle finger outside of school. The court found that the gesture was too attenuated to support the discipline and found the student's First Amendment rights had been violated. 635 F. Supp. at 1441–42. *But cf.* Fenton v. Stear, 423 F. Supp. 767, 769 (W.D. Pa. 1976), in which a student called a teacher a prick at a shopping center on a Sunday evening. The court found that the school's punishment for the student's fighting words was de minimis and thus appropriate for the de minimis insult.

others use what one court called a "flurry of standards" that aim to address all possible legal approaches.[182] The chart on page 31 summarizes the lower court decisions examined in this section.

Three points are worth briefly noting here; each will be more fully discussed in the following section. First, the majority of the cases discussed—and in particular, the four cases that employed a geographical approach—predated *Morse*. By considering the banner to be school speech despite the fact that it was held off school grounds, *Morse* undermines the importance of physical location in assessing a school's ability to discipline speech.[183] While perhaps none of the earlier cases would likely have been decided differently after *Morse*, it seems probable that some courts would not have engaged in as deep of an inquiry as to whether the speech ever literally reached the campus of the school.[184]

Second, courts are increasingly moving beyond a purely geographical approach to more expansive approaches that recognize that physical characteristics alone do not determine whether speech is school speech.[185] But while these courts are more likely to look at the effect, or potential effect, of the speech, most still classify the speech in the physical terms of "on campus" or "off campus."[186]

Finally, although some courts have applied *Fraser* to Internet speech created outside the schoolhouse gate, there is a general hesitancy to do so, even if those courts have deemed the speech "on campus."[187] The *Fraser* reluctance may be because the courts feel that they are already treading in unchartered waters by classifying the speech as student speech, and they compensate for their uncertainty by clinging to the higher standard of

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[182] Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619 (5th Cir. 2004).

[183] *See* Sarah O. Cronan, *Grounding Cyberspeech: Public Schools' Authority to Discipline Students for Internet Activity*, 97 KY. L.J. 149, 159 (2008). This point is further explored *infra* Part IV.A.1.

[184] This seems particularly true for the *Bethlehem* court, which used a geographical approach but notably placed "location" in quotes. 807 A.2d at 847, 864. The court later explained, "Although not before our court, we do not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied." *Id.*

[185] *See, e.g.*, *Layshock*, 496 F. Supp. 2d at 598.

[186] "The Court believes that Avery's blog entry may be considered on-campus speech for the purposes of the First Amendment." Doninger v. Niehoff, 514 F. Supp. 2d 199, 217 (D. Conn. 2007). In *Layshock*, the court continually referred to the student's speech as "off campus," implying that if the court had found a substantial disruption had occurred, the speech would have then been considered "on campus." 496 F. Supp. 2d at 601.

[187] Papandera, *supra* note 31, at 1069–70.

substantial disruption required by *Tinker*.[188] It is perplexing that courts would go through the trouble of determining whether speech created outside of school is student speech, only to then maintain separate standards for "on campus" speech that originated off school property, and "on campus" speech literally created on school property.

[188] *Id.* at 1070 ("[I]t may be that courts are more reluctant to apply *Fraser* to off-campus speech than *Tinker* because at least *Tinker* requires a showing that the expression disrupted or could reasonably be expected to disrupt school activities; *Fraser* does not.").

| Case and Year of Decision | Content | Test for school speech | School speech?* | *Tinker*?+ | *Fraser*?^ | Did the decision favor the student or school? |
|---|---|---|---|---|---|---|
| *Beussink* (1998) | Website criticizing school and teachers | Geographical | Yes | Yes, no | No | Student |
| *O'Brien* (1998) | Website criticizing band director | Geographical | No | No | No | Student |
| *Mahaffey* (2002) | Website listing people student wished would die | Geographical | No | Yes, no | No | Student |
| *Bethlehem* (2002) | Website criticizing teacher; requested money for hit man to kill teacher | Geographical | Yes | Yes, yes | Yes, yes | School |
| *Wisniewski* (2007) | IM icon of teacher getting shot with words "Kill Mr. VanMolen" | Reasonably foreseeable | Yes | Yes, yes | No | School |
| *Layshock* (2010) | Fake MySpace profile of principal; alleged that principal "liked to smoke big blunts" | Reasonably foreseeable | No | Yes, no | No | Student |
| *Blue Mountain* (2010) | Fake MySpace profile of principal; alleged that principal was a pervert and sex addict | Directed | Yes | Yes, yes | No | School |
| *Doninger* (2007) | Blog calling principal a douchebag | Reasonably foreseeable | Yes | Yes, yes | Yes, but with doubts | School |
| *Killion* (2001) | Emailed top ten list about athletic director | Standard-first | No | Yes, no | Yes, no | Student |

*Did the court find that the speech was student speech and thus subject to discipline?

+ Did the court apply the *Tinker* standard to the case? If yes, did the court find that the *Tinker* standard was met?

^ Did the court apply the *Fraser* standard to the case? If yes, did the court find that the *Fraser* standard was met?

## IV. DETERMINING A SCHOOL'S DISCIPLINARY REACH

In cases involving a school's ability to proscribe student speech, courts have grappled with four factors—sponsorship, effect, content, and location—albeit to varying degrees. Their struggles have become more pronounced in the digital age, as courts tend to focus heavily on location in order to determine whether a school can discipline a student for Internet speech created outside of school. A better understanding of how the Supreme Court has weighed the factors can help lower courts approach all student speech cases, including those involving the Internet.

Sponsorship poses the least amount of confusion for all student speech cases. As *Kuhlmeier* found, speech that could reasonably be interpreted as being sponsored by the school can be restricted for any legitimate pedagogical purpose. School-sponsored speech could certainly be created outside of the school grounds and on the Internet. Such speech would still to be subject to *Kuhlmeier*.[189]

Effect, content, and location thus are the more problematic issues courts face in deciding when students can be disciplined for Internet speech created outside of school. As the lower court decisions examined in the preceding section show, effect is often a prime consideration: All but one had applied a *Tinker* analysis.[190] The courts also looked at content, though less frequently: Although three of the cases explicitly applied *Fraser*, only *Bethlehem* allowed school officials to proscribe speech under that standard.[191] Location clearly was a critical factor: all of the courts but one examined whether the speech did or could have reasonably reached the physical school campus.[192]

All of the factors are important in determining when a school can discipline student speech. Lower courts, however, overemphasize location. Even those that use a more expansive approach aim to classify the speech as

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[189] A student posting to a class website from home could be sanctioned under *Kuhlmeier*. And courts would not struggle to find that a school could discipline a student for creating a website that purported to be school-sponsored, or a student who sent emails from home that implied the school had sanctioned the speech.

[190] *Mahaffey* looked to the effect of the speech, even after the court found that the speech could not be disciplined because the school had failed to prove that the speech had ever physically reached campus. *See* discussion *supra* Part III.A.1.

[191] *See* discussion *supra* Part III.A.2. Recall that *Bethlehem* also found that the speech was subject to discipline under *Tinker*. *Bethlehem*, 807 A.2d at 869. Also, as discussed *supra* Part III.A.2, the lower courts in *Doninger* and *Blue Mountain* both found that the speech was subject to discipline under *Fraser*, but the Second and Third Circuits found instead that the speech could be proscribed under *Tinker* without engaging in a *Fraser* analysis.

[192] The Third Circuit panel in *Blue Mountain* found that the speech "need not satisfy any geographical technicality" in order to be proscribed; the panel instead simply focused instead on the effect the speech could have at school. *Id.* at 301.

"on campus."[193] Moreover, many courts have requested guidance from the Supreme Court in determining what makes speech "on campus" and thus subject to discipline.[194]

Scholars, as one court noted, also "have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation."[195]

The location fixation is understandable, given *Tinker*'s famous line regarding the schoolhouse gate. But it is misguided. Location can contribute to the effect, but it is not a determining factor that warrants a separate inquiry. As the Supreme Court decisions make clear, the key factors in determining when a school can proscribe speech are effect and content.

### A. *Rethinking the Relationship Between Effect, Content, and Location in* Morse, Fraser, *and* Tinker

#### 1. Morse

As the Supreme Court's most recent decision regarding student speech, *Morse* is critical to understanding the relationship between effect, content, and location. Some lower courts and scholars have bemoaned the lack of guidance *Morse* provided on location as they address cases involving Internet speech created outside of school. But they fail to appreciate the valuable insight *Morse* did provide as to how all student speech cases, including those involving the Internet, can be analyzed. The fact that the Court spent very little time addressing whether Frederick's speech could be considered student speech is extremely significant and undermines claims that location should be a determinative factor in assessing a school's authority to proscribe speech.[196] Additionally, the Court acknowledged "uncertainty at the outer boundaries as to *when* courts should apply school speech precedents."[197] The use of "when" rather than "where" implies that a school's ability to discipline students is contextual and not dependent on location.

Furthermore, the *Morse* court never took the additional step of explaining that because the speech was school speech, it was therefore on-campus speech. In other words, *Morse* considers the case to involve student

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[193] *See* discussion *supra* Part III.B.

[194] *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619–20 (5th Cir. 2004).

[195] *Id.*

[196] *See* Morse v. Frederick, 551 U.S. 393, 400–01 (2007).

[197] *Id.* at 401 (emphasis added).

speech while never explicitly stating that speech occurred on campus.[198] This may seem like a minor point, but the Court never uses the phrase "on campus" or "off campus" in the opinion. These phrases, however, are frequently used by courts and scholars dealing with Internet speech, even though many admit their inadequacy.[199] One way to analyze the different terms is to say that Frederick's banner never actually made it on the physical campus, but Internet speech can be accessed at school. Under this view, Morse's speech is "student speech," whereas Internet speech brought to campus is "on campus." But the better reading is the simpler one that does not create two separate categories of speech that are subject to school discipline. *Morse*'s "student speech" phrase de-emphasizes geography and instead stresses the importance of context and the relationship between the speech and its effects.[200]

None of this is to say that location had no importance to the *Morse* decision. But the location of the speech was important mainly because it made the Bong Hits 4 Jesus banner more likely to affect the students. The Court found the banner could reasonably be interpreted as encouraging drug use, an effect the Court found detrimental. It was thus the content of the speech (illegal drugs) and the effect of the speech (promoting their use) that guided the *Morse* decision.

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[198] The Court explains that "we agree with the superintendent that Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim that he is not at school." *Id.* (internal quotations omitted).

[199] *See, e.g.*, Justin P. Markey, *Enough Tinkering With Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 149 (2007) (quoting Thomas W. Wheeler II, *Slamming in Cyberspace: The Boundaries of Student First Amendment Rights*, RES GESTAE, May 2004, at 29–30) (finding "student Internet speech is never truly 'off campus.' . . . [T]he concept of defining speech by its geographic origin or receipt is nothing more than a legal construct to limit the scope of a school district's authority to punish student speech").

[200] As two scholars pointed out, "That no one knows quite where the limits to the school's authority lie only complicates decisions for teachers and administrators, as well as for students who are 'caught off guard when they are punished' for things written on 'their' websites." Denning & Taylor, *supra* note 31, at 868. One simple step toward addressing the issue of when a school can discipline student speech is for courts to stop classifying speech as "on" or "off" campus. The terms can be disingenuous, particularly to students who are likely to be well-read on case law and will think that any speech spoken or written off school property is beyond the disciplinary arm of the school. To provide more guidance to students and schools in terms of what may be subject to discipline, using the term "school speech" is an important step forward.

### 2. Fraser

Content and effect were also the determining factors in *Fraser*. The Court focused on the lewd and vulgar content of the speech. Location was important: the speech took place during a school assembly. But again, location was important only *because* it was a factor contributing to the effect the speech could have on students. That effect did not need to rise to the level of a material disruption because the content of Fraser's speech made it undeserving of *Tinker* protection. The Court certainly did not consider effect to be irrelevant: It described how the speech actually insulted students and could have been disturbing to many more.[201] Moreover, the opinion continually refers to the offensive nature of the speech, a word that by definition implies an effect on another person.[202]

As Justice Brennan suggested in his concurring opinion, the content of Fraser's speech alone did not justify the school's discipline. It was rather the context of the speech: the lewd and vulgar content combined with the offensive effect at school.[203]

### 3. Tinker

A substantially disruptive effect, or the possibility thereof, was at the heart of the concerns of the *Tinker* court. The decision was perhaps misleading because it referred to the schoolhouse gate, and this reference has focused unnecessary attention on the location of the speech. Under *Tinker*, the content of speech is protected, so long as it does not fall under a *Fraser* or *Morse* exception, and so long as the effect of the speech is not a substantial disruption.

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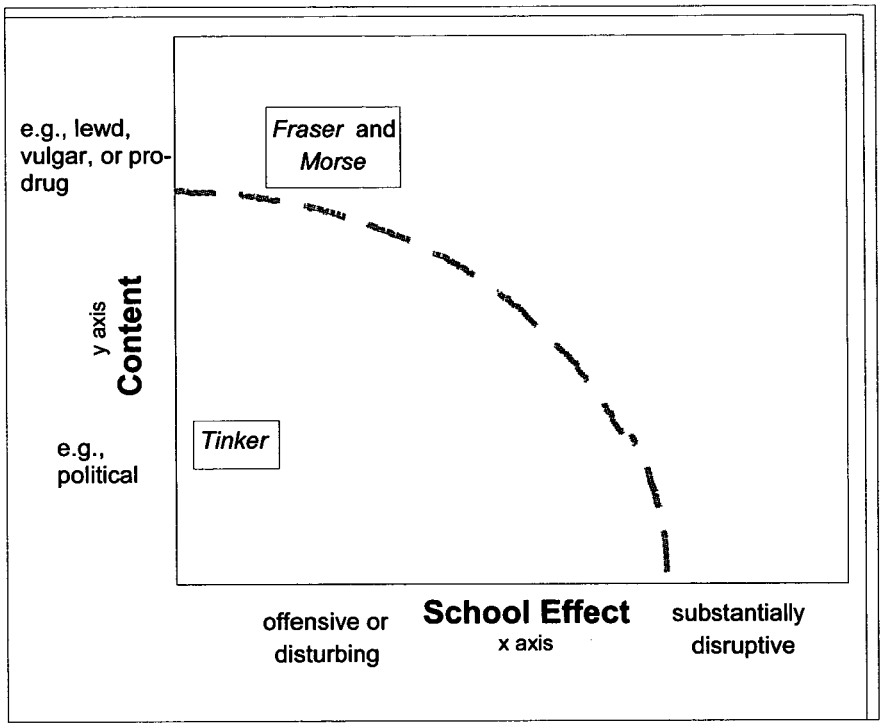
[201] *Fraser*, 478 U.S. at 683–84.

[202] The dictionary defines "offensive" as "making attack; aggressive: of, relating to, or designed for attack; causing displeasure or resentment." WEBSTER'S DICTIONARY 819 (9th ed. 1985). The word appears twelve times in the majority opinion. For example, the court wrote that "it is a highly appropriate function of public school education to prohibit the use of vulgar and *offensive* terms in public discourse" and that the "'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly *offensive* or highly threatening to others." *Fraser*, 478 U.S. at 683 (emphasis added).

[203] Justice Brennan explained that "Respondent's speech may well have been protected had he given it in school but under different . . . ." *Fraser*, 478 U.S. at 689 (Brennan, J., concurring).

## B. *The Organizational Tool*

As the Supreme Court decisions show, a school's ability to proscribe student speech depends on the relationship between two variables: effect and content. These two factors apply, regardless of where the speech originates, or what form it takes—be it spoken at a school assembly, unfurled on a banner across the street from the school, sent in an email message to other students, etc. The following graph illustrates how these variables interact and provides a useful tool to approach student speech cases:




### 1. *Interpreting the Graph*

The x-axis is school effect, and the y-axis is content. A decision on whether a school can discipline for speech depends on the intersection of these two variables. Speech within the dashed line is protected.

The school officials in *Tinker* suspended the students because they feared the anti-war armbands would cause a disturbance. But as the Supreme Court made clear, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[204] The content of political speech is protected so long as its effect does not reach or pass the

[204] *Tinker*, 393 U.S. at 508.

substantially disruptive mark on the x-axis (school effect). Protected speech may include speech that has the *potential* to be substantially disruptive, per the holding in *Tinker*.

Schools can discipline students for speech that appears high on the y-axis (content). The Supreme Court decisions in *Morse* and *Fraser* have provided examples of lewd, vulgar, or pro-drug speech that can be proscribed for their content, but those examples may not be exhaustive. Therefore, schools can proscribe student speech on the basis of content, so long as the speech has some effect at school that places it on the x-axis—even if it does not reach the substantially disruptive point.

Generally, however, most speech will not reach the high mark of content. It will thus fall below this line on the content axis, and to determine whether it can be subject to school discipline, one must look to the x-axis (school effect).

Determining where speech sits on the school effect axis is more challenging, but depending on the case, a variety of factors can be used to guide courts. The speech does not have to be located physically on school grounds—a point made clear in *Morse*. Location is one of many factors that can determine effect. But location is not determinative; it is only relevant in that it can influence the effect. Speech originating on school grounds may, in some cases, have a greater effect on the school, but speech created off campus can also have a school effect that subjects the speech to discipline. Additionally, the speech does not need to appear in physical form on campus—for example, certain speech created outside of the school and read widely by the community outside of the school campus can still have a substantial effect on school, even if the website is never accessed on the school campus.

A variety of factors in addition to location may help determine the effect the speech had or could potentially have on a school. The number of recipients might be another factor influencing where speech falls on the school effect axis. Fraser delivered his speech at an assembly with over six hundred students.[205] If he had delivered it at lunch to five of his friends, the Court likely would have found that the speech could not have been subject to discipline. Similarly, in a hypothetical case involving Internet speech created off campus, a student who emails a few of his friends would be less likely to face discipline than a student who emails the speech to the entire student body.

The communication medium could also help determine where speech falls along the school effect axis. Wearing a potentially disruptive T-shirt to school poses a different, but not necessarily greater or lower, risk of causing a substantial disruption than does posting on a fellow classmate's widely-

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[205] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

read blog. Courts will have to determine how the manner in which the speech was communicated affects the school. One scholar suggests differentiating between active telepresence, like telephoning or instant messaging, that should be subject to discipline, and passive telepresence, like creating a website, that generally should not be.[206] This argument, however, focuses on the communication medium in isolation of the effect and thus may be flawed in a similar manner to the "schoolhouse gate" approach that examines whether the speech ever made its way physically onto the school campus. While communication medium and location may each contribute to the effect, it is the effect itself that most deserves the court's focus.

In deciding where to place speech on the x-axis (school effect), courts also might choose to consider the intended effect in addition to the actual effect. Such an inquiry would reduce the chance of students being disciplined for speech that is only brought to the attention of others by a third party.[207] But courts that consider intent should recognize that the communication medium students choose to use to express themselves says something about their intent. This was acknowledged by the *Doninger* decision, which highlighted the fact that the student chose a blog to express her displeasure.[208] A student might claim that she did not intend for anyone else to know her thoughts, but such a claim is likely to be more credible if she wrote them in a diary than if she published them on the Internet.

Location, number of recipients, communication medium, and intent are examples of factors that could be used to determine where speech falls on the school effect axis. But location has been widely overused by courts in determining when students can be disciplined for Internet speech. A more robust approach would be to recognize that location is not the only— nor the

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[206] Telepresence, according to the author, "indicates the ability to project one's influence in space and time." Pike, *supra* note 67, at 973 n.10 (citing Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3 (1997); Jessica M. Natale, Article, *Exploring Virtual Legal Presence*, 1 J. HIGH TECH. L. 157 (2002)).

[207] In *Doe v. Pulaski County Special School District*, a court upheld a school decision to suspend J.M., a student who had written a letter at home in which he expressed a desire to rape and murder a student. The letter made its way to school via another student. The court found that J.M. intended the letter to be communicated, and thus it was a "true threat" that fell outside of constitutionally-protected free speech. 306 F.3d 616–17 (8th Cir. 2002). Compare this case with *Porter v. Ascension Parish School Board*, in which a student drew a picture of his school under a violent siege. 393 F.3d 608, 617–18 (5th Cir. 2004). Two years after he drew the picture, the student's brother brought the picture to campus, and the student was expelled. *Id.* The Fifth Circuit found that the student's drawing was protected by the First Amendment: "For such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place." *Id.*

[208] 514 F. Supp. 2d at 202.

determinative—factor in deciding when a school may proscribe student speech.

### 2. *Limitations and Lingering Questions*

The dashed line on the graph emphasizes the changing nature of the law. The Court recently decided *Morse*, and it is possible that another Supreme Court standard will emerge that further addresses content or effect that warrants discipline. The dashed line also reflects the inherent challenges in placing qualitative terms such as "lewd" or "substantially disruptive" on a graph. Courts have not been in agreement about what constitutes a substantial disruption, lewd or vulgar speech, or a pro-drug message, nor do they agree as to how much deference should be given to school officials in addressing those questions. As noted in *Layshock*, student speech cases are often close calls, and courts will come out on different sides.[209] But this was true before courts faced Internet speech cases, and of course, it is true in other areas of jurisprudence as well.

The graph draws attention to another important but unanswered question: How much of an effect must *Fraser*-like or *Morse*-like speech have to make it subject to discipline? Even courts that are willing to extend the reach of the school's disciplinary arm beyond the physical school campus tend to shy away from applying *Fraser* (and presumably *Morse*) to Internet speech. In doing so, they essentially constrain those decisions to speech occurring inside the schoolhouse gate. [210] This approach implies that for Internet speech created off campus, the only relevant question is whether a substantial disruption occurred or could have occurred. If instead courts were to de-emphasize the question of location with respect to Internet speech, they could focus on the critical factors of content and school effect. It is certainly important to ensure that *Fraser* and *Morse* are not read so widely as to enable school officials to proscribe any speech made by a student that is lewd,

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[209] 496 F. Supp. 2d at 601–02. *Layshock* noted that it "respectfully reache[d] a slightly different balance between student expression and school authority" than the court had in *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 851 (Pa. 2002). For more on the differing opinions, see discussion *supra* Part III.A.2.

[210] *See* Papandrea, *supra* note 31, at 1070; *see also* J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 298 (3d Cir. 2010) (avoiding applying *Fraser* by finding that the website could have created a substantial disruption and thus was subject to discipline under *Tinker*); Doninger v. Niehoff, 527 F.3d 41, 49–50 (2d Cir. 2008) (similarly finding that an analysis under *Fraser* was not necessary because the speech could be proscribed under *Tinker*).

vulgar, or pro-drug. But this should not be done by maintaining some arbitrary gate between "on campus" and "off campus."[211]

Rather than creating new standards in response to new technology, the focus should be on clarifying the standards that are already in place. The question should not be, "When is speech on campus?" but rather, "What *school effect* is needed to proscribe speech under *Fraser* or *Morse*?" Similarly, the question should not be, "Does *Morse* apply to speech created on the Internet?" but instead, "What type of content does *Morse* proscribe?"

Perhaps if the *Tinker* court had envisioned the Internet and its impact on speech and schools, the Court would have left out the language about the schoolhouse gate. The line between speech that occurs on campus and off campus is already blurred and may continue to become less clear as technology advances.[212] Virtual schools are already a popular alternative to brick-and-mortar campuses, and Internet classes are commonly used by public schools throughout the United States.[213]

The schoolhouse gate is disappearing, but the essence of *Tinker*'s holding remains: The ability of a school to proscribe speech depends on the content and effect of the speech. There is not a need for a new standard addressing the Internet. Forty years from now, schools will likely be vastly different than they are today. Indeed, there may be no campus at all. Both schools and methods of communicating will continue to evolve, just as they have done since *Tinker*.

In one of the most recent decisions involving Internet speech created outside of school, a court noted that "First Amendment jurisprudence will need to evolve" to address the new environment of the digital age, where "[o]ff-campus speech can become on-campus speech with the click of a

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[211] The gate is arbitrary because it is applied to *Fraser* and *Morse*, but not to *Tinker* or *Kuhlmeier*.

[212] Denning & Taylor, *supra* note 31, at 837 ("[G]iven the fact that schools are awash in gadgets that permit students to access the Internet, text message or e-mail one another, and send pictures and video, the line between on-campus and off-campus speech is blurring. It is becoming difficult to keep speech out of schools, even if schools (and perhaps the speaker) want to.").

[213] A recent report noted that as of September 2007, all but eight states offered supplemental online education programs, full-time online education programs, or both. JOHN WATSON, KEEPING PACE WITH K–12 ONLINE LEARNING: A REVIEW OF STATE-LEVEL POLICY AND PRACTICE 6 (2007)), *available at* http://www.nacol.org/docs/KeepingPace07-color.pdf (last visited April 23, 2010). The report noted that "the main issue in most states is no longer whether or not online learning is occurring, but rather how it is being implemented." *Id.* Enrollment in these programs will likely grow, and some experts predict that by 2019, half of high school courses will be delivered online. Clayton M. Christensen & Michael B. Horn, *How Do We Transform Our Schools?*, EDUC. NEXT, Summer 2008, 12, 17.

mouse."[214] But the evolution does not require a new standard that addresses Internet speech exclusively, nor does it require one that attempts to define what is "on campus" or "off campus." Rather than developing a special standard that applies to the Internet—a communication medium that itself may become obsolete—the focus should be on clarifying the standards already in place. A school's ability to discipline students for speech since *Tinker* has depended on both the content and the effect of the speech. Content and effect should remain the key factors that courts consider in student speech cases.

[214] Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn. 2009).